

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

To Be Argued By
GARY P. NAFTALIS

B
Pgs

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-1698

UNITED STATES OF AMERICA,

Appellee,

- against -

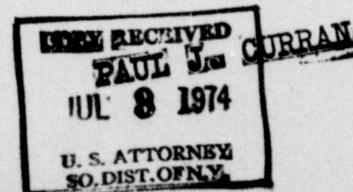
WILSON TORRES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO BRIEF
FOR APPELLANT

GARY P. NAFTALIS
Attorney for Defendant-
Appellant
Office & P.O. Address
One Rockefeller Plaza
New York, New York 10020
(212) JU 6 - 2211



(5)

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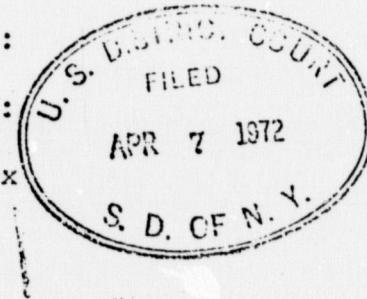
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72 CRIM. 391

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA, :
-v- : INDICTMENT
JOSE SANJURJO, WILSON TORRES, : 72 Cr.
JESUS SANJURJO, and HECTOR ORTEZ,
Defendants.
-----x



The Grand Jury charges:

1. From on or about the 1st day of December, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JOSE SANJURJO, WILSON TORRES, JESUS SANJURJO, and HECTOR ORTEZ, the defendants and others to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

USA-33s-538 - p.2 - IND./INF. (Conspiracy to distribute and possess with intent to distribute narcotic drug.)
Ed. 5/1/71

WCMacD:sr
72-0753

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about January 11, 1972, the defendant JOSE SANJURJO, stated to another that he would sell and deliver one ounce of heroin for \$1,000.00.
2. On or about January 13, 1972, defendant JOSE SANJURJO met with the defendant HECTOR ORTEZ.
3. On or about January 13, 1972, the defendant HECTOR ORTEZ delivered a package of heroin in exchange for \$1,000.00.
4. On or about February 14, 1972, the defendants HECTOR ORTEZ and JESUS SANJURJO stated to another that they would sell and deliver one-eighth kilogram of heroin for \$3,600.00.
5. On or about February 14, 1972, the defendant WILSON TORRES stated that he would deliver the heroin.

(Title 21, United States Code, Section 846.)

WCMacD:sr

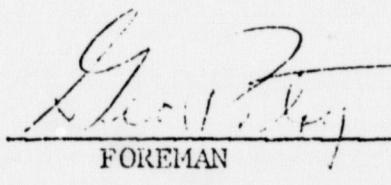
SECOND COUNT

The Grand Jury further charges:

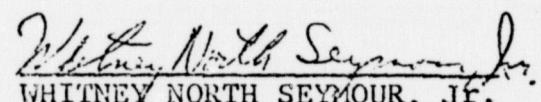
On or about the 18th day of January, 1972

in the Southern District of New York, HECTOR ORTEZ
and JOSE SANJURJO the defendants, unlawfully,
wilfully and knowingly did distribute and possess
with intent to distribute, a Schedule I narcotic
drug controlled substance, to wit, approximately
30.05 grams of heroin hydrochloride.

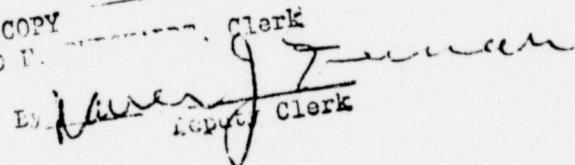
(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(A).)



FOREMAN



WHITNEY NORTH SEYMOUR, JR.
United States Attorney

A TRUE COPY
RAYMOND N. TURMAN, Clerk
By 

RAYMOND N. TURMAN, Clerk

72 KM. 3 - 1
72 KM. 39 1

DATE	PROCEEDINGS
9-1-72	Jesus Sanjurjo=(atty. present) Bench warrant vacated. Bail fixed in the amount \$5,000. Bond. Trial Sept. 11, 1972 at 10:00 A.M. Wyatt, J.
9-11-72	Trial begun with interpreter as to deft Jesus Sanjurjo Jury empaneled and sworn.
9-12-72	Trial cont'd Summations and charge. Jury finds the deft Jesus Sanjurjo Guilty on ct 1. Sentence Oct. 27, 1972 2:00 PM Pre-sS.I ordered Bail Cont'd Wyatt, J.
9-8-72	Defts. Sanjurjo and Torres - B/W issued.
10-2-72	<i>Jose Sanjurjo, Wilson Torres, Hector Ortez</i> Closed statistically because (<input checked="" type="checkbox"/> defendant) is (<input type="checkbox"/> co-defendant) a (<input type="checkbox"/> witness) fugitive. In all other respects this case is still pending.
10-27-72	JESUS SANJURJO-Filed Judgment(Atty.present & interpreter in Court)Deft is committed to the custody of the Atty.Gen. for imprisonment for a period of THREE YEARS on count 1. Pursuant to Ti.18 Sec.3651, U.S.Code on condition the deft be confined in JAIL or treatment type institution for SIX MONTHS, the execution of remainder of prison sentence suspended, and deft placed on probation for a period of THREE YEARS, subject to the standing probation order of this court....Wyatt,J. Issued copies.
11-16-73	JESUS SANJURO-Filed true copy of J & C with Marshal's return-Deft. delivered on 10-27-72 to Warden, Federal Detention HQRTS, N.Y.C.
1-28-73	JOSE SANJURJO = Deft. present - Larry Greenburg of Legal Aid, assigned by Magistrate Goettel. Deft. released on Bail fixed in the sum of \$25,000.00 P.R.B. Trial Feb 4, 1973, Room 705 @ 9:30 A.M. ---- WYATT .
12-5-73	JOSE SANJURJO+ Filed CJA 23 -- Financial Affidavit.
1-23-74	Pre-Trial Conference held. --WYATT,J.
2-1-74	JOSE SANJURJO= Deft. not present. Pre-trial confer. held. ---WYATT,J.
2-1-74	SANJURJO AND TORRES= Filed the following papers rec'd from Magistrate Raby, (Mag#72-335). Docket entry sheets - Crim Complaint - Disposition Sheet - Notice of Appearance sheets - Appearance Bond's.
2-22-74	JOSE SANJURJO= Filed the following papers rec'd from the United States District Court, Office of the Clerk, Puerto Rico, 00904: San Juan. Warrant of Removal on Indictment -- Warrant for Arrest of Deft -- U.S. Gov't Memorandum - Magistrates Temporary Commitment -- Notice of Appearing Counsel -- Motion for Reduction of Bail -- Waiver of Removal Hearing -- Minutes of Proceedings .
2-22-74	WILSON TORRES= Filed the following papers rec'd from the United States District Court, Office of the Clerk, Puerto Rico, San Juan, 00904: Warrant of Removal on Indictment -- Warrant for Arrest of Deft -- Magistrate's temporary Commitment -- Waiver of Removal Hearing.

DATE	PROCEEDINGS
2-28-74	JOSE SANJURJO= Filed the following supplemental papers rec'd from U.S. District Court, Office of the Clerk, Puerto Rico, 00904: Minutes of Proceedings - Appearance Bond for the Sum of \$25,000. - Bail Reform Act Form No. 2 - Warrant of Removal on Indictment.
3-13-74	WILSON TORRES= Filed ORDER that Gary P. Naftails, of One Rockefeller Plaza, New York, N.Y. 10020, is hereby added to the Panel of Attorneys for the sole purpose of representing the Deft in the above-entitled case, and that a copy of this order shall be filed with the Clerk of the Court of Appeals, Second Circuit. --EDELSTEIN, C.J.
3-15-74	WILSON TORRES- (Gary P. Naftalis C.J.A. appointment) Deft. present with interpreter Court directs a plea of not guilty be entered. Deft. remanded in lieu of bail fixed in the amount of \$25,000. cash or surety bond. Trial March 25, 1974 9:30 A.M. Rm. 705---Wyatt, J.
3-18-74	JOSE SANJURJO (atty present) Deft. remanded in lieu of bail fixed in the amount of \$75,000.---Wyatt, J.
3-15-74	WILSON TORRES- Filed Warrant of Removal from District of Puerto Rico.
3-18-74	WILSON TORRES- Filed CJA Copy 5 appointing Gary P. Naftalis, 1 Rockefeller Plaza N.Y.C. 10020 3-15-74--Wyatt, J. mailed notice to A.O.
3-18-74	WILSON TORRES- Filed deft's Financial affdvt CJA 23.
3-21-74	JOSE SANJURJO- Deft. (atty present) withdraws his plea of not guilty on count 1 and pleads guilty to count 1. Sentence April 26, 1974 at 2:30p.m. P.S.I. Ordered. Deft. remanded and bail is revoked and exonerated ---Wyatt, J.
3-22-74	HECTOR ORTEZ- Deft. (Robt. Mitchell assigned CJA, & interpreter present) Court directs entry of not guilty plea. Deft. remanded in lieu of bail fixed in the amount of \$50,000. cash or surety bond.---Wyatt, J.
3-22-74	HECTOR ORTEZ- Filed deft. financial affdvt--CJA 23.
3-25-74	HECTOR ORTEZ- Attys present - Deft withdraws his plea of Not Guilty and pleads GUILTY to Counts 1 & 2. Sentence 5-3-74 @ 2:30 PM, Room #1106 (Interpreter, Gerando Sanchez) Pre-sentence report ordered. Remand---WYATT, J.
3-25-74	WILSON TORRES= Jury Trial begun, (Interpreter Joaquin R. Guma)
3-26-74	" " = Hearing held and concluded. Trial continued.
3-27-74	" " = Trial cont'd. Verdict GUILTY. Sentence May 10, 1974. (Interp-Maria Elena Gordenca) Pre-Sentence investigation ordered. Deft Torres cont'd remanded in lieu of bail---WYATT, J.
3-28-74	JOSE SANJURJO= Filed CJA 21, Copy #5, approving payment to Maria Elena Cardenas for interpreting Services on Mar 15, 25, 26, 27, 1974 --- WYATT, J.
3-28-74	HECTOR ORTEZ= Filed CJA 21, Copy #5, authorizing counsel.
3-28-74	JESUS SANJURJO= Filed CJA 21, Copy #5, approving payment for Court Reporting Servi

(Cont'd On Page #4)

DATE	PROCEEDINGS
3-28-74	HECTOR ORTEZ- Filed CJA 21, Copy #5, approving payment for interpreting services dated March 25, 26, 1974 --WYATT, J.
3-28-74	WILSON TORRES- Files CJA 21, Copy #5, authorizing Court Reporting services.
3-25-74	HECTOR ORTEZ- Filed warrant for arrest with marshal's return-executed 3-22-74.
3-28-74	J. SANJURJO & W. TORRES- Filed CJA 21 copy 2 approving payment to Maria Elena Cardenas as interpreter dated 3-27-74--Wyatt, J.
3-28-74	J. SANJURJO & W. TORRES- Filed CJA 21 copy 2 with memo endorsed-I approve furnishing the transcript of the trial of Jesus Sanjurjo. I do not approve daily transcript at the forthcoming trial of Torres--Wyatt, J. dated 3-26-74. (for Court Reporters)
3-14-74	Filed transcript of record of proceedings, dated 3-25, 26, 1974.
3-9-74	Filed transcript of record of proceedings, dated 9-11-72.
3-9-74	Filed transcript of record of proceedings, dated 10-27-72.
3-17-74	WILSON TORES - Filed Notice of Appeal from the Judgment entered 5/17/74. (mailed notice) - Leave to Proceed on appeal in forma pauperis. So Ordered Wyatt J.
3-17-74	✓ WILSON TORES - Filed Judgment & Commitment that deft. is committed to the custody of the atty. General or his authorized representative for imprisonment for a period of One(1) Year, pursuant to the provisions of Section 841 of T.21, USC, Deft. is placed on Special Parole for a period of Three(3) Years, to commence upon expiration of confinement. Wyatt J.
3-17-74	HECTOR ORTEZ - Filed Judgment & Commitment that deft. is committed to the custody of the atty General or his authorized representative for imprisonment for a period of Three(3) Years, on each counts 1 & 2, to run concurrently with each other pursuant to T.18, SEC. 3651,USC, on condition the deft be confined in a jail or treatment type institution for Six(6) Months, the remainder of the sentence of imprisonment is suspended & the deft is placed on probation for a period of Three(3) Years, subject to the standing probation order of this court. Pursuant to the provisions of Sec. 841, of T.21,USC deft. is placed on Special Parole for a period of Three (3) Years to commence upon expiration of confinement. Wyatt J.
5-24-74	JOSE SANJURJO - Filed Judgment & Commitment that deft. is committed to the custody of the atty General or his authorized representative for imprisonment for a period of Eighteen (18) Months. pursuant to the provisions of Section 841 of T/21 USC deft. is placed on Special Parole for a period of Three (3) Years, to commence upon expiration of confinement, Ct. 2. is dismissed on motion of HECTOR ORTEZ of defts. counsel with consent of the Gov't. Wyatt J.
5-22-74	Filed CJA 20 Copy 2- approving payment to Robert Mitchell dtd. 3/22/74 Wyatt J. (mailed copy of CJA 20 copy 1 to ADM. OFFICE) (FOR HECTOR ORTEZ)
5-22-74	WILSON TORES - Filed CJA 21 copy 2 approving payment to Ms Mana Elena Cardenas for interpreting service on 5/17/74 Wyatt J. (mailed copy CJA 21 copy 1 to ADM.OFFICE)
5-22-74	WILSON TORES - Filed CJA 21 copy 5 approving payment to Ms Mana Elena Cardenas for interpreting service. Wyatt J.

110 Rev. Civil Docket Continuation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S.C.A. NO. _____

USA

VS.

WILSON TORRES.

CASE NO. 72 CR 391
JUDGE W. Falet.

EXTRACT OF DOCKET ENTRIES

DATE

PROCEEDINGS

JULY 1, 1974	FILED TRANS. OF PROCEEDINGS DTD. 3/25/74
JULY 1, 1974	FILED TRANSC. OF PROCEEDINGS DTD. MAY 17, 1974
JULY 1, 1974	FILED TRANS. PROCEEDINGS DTD SEPT 11, 1974

AT THE COURT CLERK
MANAGED BY CLERK
By A. E. Thompson
Deputy Clerk

2 THE COURT: Madam Forelady, ladies and gentlemen
3 of the jury, this case is now about to be submitted to you
4 for your decision on the issues of fact here involved and
5 your decision, of course, on those issues, determines
6 whether your verdict as to this defendant is guilty or
7 not guilty.

8 In making your decision, you, members of the
9 jury, act as ministers of justice and are asked to discharge
10 an obligation of citizenship which it is not too much to
11 call sacred.

12 In making your decisions, you are to adopt an
13 attitude of complete fairness and complete impartiality.
14 You are to appraise the evidence calmly and objectively
15 and without any bias or prejudice for or against the
16 government or for or against the defendant. You are the
17 sole and exclusive judges of the facts. You determine the
18 weight of the evidence and the credibility of all wit-
19 nesses. You decide all conflicts and differences in the
20 evidence. You draw whatever reasonable inferences are
21 justified from the facts as you may find those facts to
22 be. My function at this point is to give you instructions
23 as to the applicable law. Your duty is to accept and apply
24 my instructions to the facts as you may find those facts
25 to be.

2 Now, in determining what the facts are, you
3 must rely on your own recollection, which is what controls.
4 What I may say to you during these instructions and what
5 counsel have said to you this afternoon and earlier in
6 the trial is not evidence, is not binding on you and is
7 not to be taken in place of your own recollection, which,
8 again, is what controls. The fact that I may from time
9 to time have sustained objections, made rulings, over-
10 ruled objections, granted motions, denied motions, all
11 relate to matters of law and, of course, as to matters of
12 law, the jury has no concern, and, in particular, no
13 ruling made by me at any time is to be taken as any indi-
14 cation of any view by me as to the guilt or innocence of
15 the defendant or the truth or falsity of any of the
16 charges.

17 You are not to assume that I have any opinion
18 as to the guilt or innocence of the defendant or as to
19 the truth or falsity of any of the charges. The fact that
20 the Court may have made these various rulings should not
21 be taken by you as any indication that the defendant is
22 believed by the Court to be guilty or innocent, and I
23 would remind the jury that what is said between the Court
24 and counsel the jury should disregard. And in this con-
25 nection I should say, members of the jury, that judges

2 are indeed human and sometimes I have been impatient, I
3 may have been too frequently impatient, it is a fault on
4 my part and you should draw no inference against the side
5 against whom my impatience may have seemed to be directed.

6 Counsel on both sides are able and devoted and
7 their zeal on behalf of their respective clients is com-
8 mendable. I also believe I asked a few times questions
9 of one witness or another but, if so, it was solely in an
10 attempt to make something clearer, as I believed might be
11 possible, and certainly the fact that I may have asked
12 questions is again not to be taken as any indication of
13 any view by me as to the credibility of any witness or,
14 again, as to the guilt or innocence of the defendant.

15 I emphasize also, as I had occasion to do this
16 morning, that the question is never evidence, it is only
17 the answer which is evidence.

18 Now, members of the jury, the indictment, as I
19 have said several times, is merely a charge, an accusation.
20 It is not evidence and no proof of the guilt of the de-
21 fendant.

22 You should give no weight to the fact that an
23 indictment has been returned. He, the defendant, has
24 pleaded not guilty. The fact that the government is a
25 party here and that the prosecution has brought in the

2 name of the United States does not entitle the government
3 or its witnesses to any greater consideration than that
4 accorded to any other party. At the same time the government
5 and its witnesses are entitled to no less consideration.
6 All parties, government and individuals alike, stand as
7 equals here before the bar of justice.

8 The government, as I have said several times,
9 has the burden of proving the charges against the defendant
10 beyond a reasonable doubt. It is a burden which never
11 shifts. It is upon the government through the entire
12 trial.

13 A defendant does not have to prove his innocence.
14 On the contrary, he is presumed to be innocent. This presumption disappears only when, as and if you in the jury
15 room in your deliberations are satisfied that the government
16 has sustained its burden of proving the guilt of the
17 defendant beyond a reasonable doubt and, members of the
18 jury, in weighing the evidence, you will consider the
19 quality and the substance of the evidence and not the
20 quantity or the number of witnesses.

22 What do we mean by the expression "reasonable
23 doubt."

24 It is a doubt, we say, first, which is founded
25 upon reason and which arises out of the evidence or the

2 lack of evidence. It is a doubt which a reasonable person
3 has after carefully weighing all the evidence. It is a
4 doubt which is substantial and not shadowy. Reasonable
5 doubt is one which appeals to your judgment, your **common**
6 **sense**, your experience, your reason. It is not an ex-
7 cuse to avoid the performance of an unpleasant duty. It
8 is not a vague, speculative, imaginary doubt, but such a
9 doubt as would cause prudent people to hesitate before
10 acting in matters of importance to themselves.

11 Proof beyond a reasonable doubt does not mean
12 proof beyond all possible doubt. If that were the rule,
13 few men or women, however guilty, would ever be convicted,
14 because it is practically impossible for a person to be
15 absolutely and completely convinced of any fact which is
16 not capable of being proved to a mathematical certainty.
17 In consequence, the law in a criminal case is that the
18 guilt of the defendant must be established beyond a reason-
19 able doubt and not beyond all possible doubt.

20 Of course, as I told you in the beginning, the
21 fact that three of the four defendants named in this
22 indictment are not on trial here in this trial, has no-
23 thing to do with the issues which are on trial here. No
24 adverse influence against the defendant or the government
25 may be drawn from the absence of the other three defendants,

2 nor may any inference adverse to the defendant be drawn
3 from the fact, as you have heard, that Ortiz, one of the
4 four defendants named, had pleaded guilty.

5 The indictment charges the defendants, including
6 this defendant, Wilson Torres, here on trial, with an
7 offense under the comprehensive Drug Abuse Prevention and
8 Control Act of 1970.

9 This Act was passed by Congress because of a
10 concern with the ~~illicit~~ distribution of narcotic drugs
11 which have a substantial and detrimental effect on the
12 health and welfare of the people of this country.

13 The part of this Act which is specifically applic-
14 able to the charge here, is called the Controlled Sub-
15 stance Act. It is not necessary for you to remember the
16 names of these Acts or the numbers of the applicable sec-
17 tions; it is sufficient if you remember what offenses the
18 acts forbid and the essential elements of the offense
19 charged in this particular indictment.

20 The term "controlled substance" is used in the
21 acts to refer to any drug included in one of 5 schedules
22 established by Section 812 of Title 21, a part of the
23 Controlled Substance Act.

24 Now, heroin is an opium derivative and is a
25 narcotic drug included in Schedules 1 and 2 of the

2 Controlled Substances Act. Heroin is thus a controlled
3 substance.

4 Among other things, it is made unlawful by Sec-
5 tion 841 of Title 21 of the United States Code, a part of
6 the Controlled Substances Act, for any person knowingly or
7 intentionally to distribute or to possess with the inten-
8 tion to distribute, any controlled substance such as her-
9 oin. To distribute a controlled substance means to deli-
10 ver it, that is, the actual, constructive, or attempted
11 transfer of the substance. The statute, as you have just
12 heard, makes it unlawful to possess with intent to dis-
13 tribute any controlled substance such as heroin.

14 "Possess" is the term used in the statute. This
15 may be of two types, actual or constructive possession.

16 "Actual possession" means knowingly to have per-
17 sonal, manual or physical control of a drug. "Constructive
18 possession" means that although the drug is in the physical
19 possession of another person, a defendant knowingly has
20 the power to exercise control over the drug or over its
21 distribution or to set the price for its sale or to cause
22 its delivery.

23 Members of the jury, I have just explained some
24 of the provisions of the applicable law, the Controlled
25 Substances Act, and some of the conduct prohibited, but

2 the defendant, Wilson Torres, is not here charged with a
3 violation of the sections to which I have referred and
4 which sections are sometimes called substantive or basic
5 offenses. He, the defendant Wilson Torres, in this indict-
6 ment, with others, is charged instead with having con-
7 spired with the others to violate those sections. A con-
8 spiracy is a separate and distinct offense from a viola-
9 tion of the basic or substantive offenses.

10 A conspiracy which is sometimes referred to as
11 a partnership in crime, because it involves collective or
12 organized action, presents a greater potential threat to
13 the public than the illicit activity of a single
14 wrongdoer. Group association or organized activity
15 renders detection more difficult than in the instance of
16 a single individual. For these and other reasons,
17 Congress has enacted a special law which provides that
18 any person who conspires to violate the Controlled Sub-
19 stances Act is guilty of a separate offense.

20 So the charge against the defendant, Wilson
21 Torres, is that he conspired with the others to violate
22 certain laws relating to narcotic drugs.

23 I read to you the indictment yesterday and I
24 will not read it to you again. I will, however, at the
25 end of these instructions give a copy of the indictment

2 to Madam Foreman for your convenient use during your deli-
3 berations and, again, I remind you that the indictment is
4 simply for your convenient use, it is not evidence. The
5 defendant has pleaded not guilty.

6 Now, in order to convict the defendant, the
7 government must prove beyond a reasonable doubt the fol-
8 lowing essential elements: 1, the existence of the con-
9 spiracy charged in the indictment. 2, that the defendant,
10 Wilson Torres, knowingly associated himself with that con-
11 spiracy and, 3, that one of the conspirators knowingly
12 committed in the Southern District of New York, and that
13 includes, as you remember, Manhattan and the Bronx, at
14 least one overt act.

15 It is not required, members of the jury, that
16 the government prove that the conspiracy started and ended
17 on the date alleged in the indictment; it is sufficient
18 if you find that in fact a conspiracy was formed and
19 existed for sometime within that period and that at least
20 one overt act was committed in furtherance of the conspi-
21 racy.

22 The offense of conspiracy is complete when the
23 unlawful agreement is made and any single overt act is
24 thereafter knowingly committed by one, at least, of the
25 co-conspirators.

2 Now, let us ask ourselves what is a conspiracy.

3 It is a combination or agreement of two or more persons
4 by concerted action to accomplish a criminal or unlawful
5 purpose, as here charged, to distribute or possess with
6 intent to distribute a narcotic drug, namely, heroin.

7 It is not necessary for the government to prove
8 all the illegal objects of the conspiracy; it is suffi-
9 cient if the government proves either of the illegal
10 objects, that is, to distribute drugs or to possess with
11 intent to distribute drugs. The gist of the crime of
12 conspiracy is the unlawful combination or agreement to
13 violate the law. Whether or not the conspirators succeed
14 in accomplishing -- whether or not they accomplish in fact
15 what it is they conspired to do, is immaterial to the
16 question of their guilt or innocence of the charge of
17 conspiracy.

18 Thus, it is not necessary in a conspiracy case
19 for the government to prove that conspiracy was success-
20 ful. As I have said, a conspiracy is sometimes called a
21 partnership in crime, a partnership for criminal purposes
22 in which each member becomes the agent of every other mem-
23 ber.

24 To establish a conspiracy the government is not
25 required to show that two or more parties sat down and

2 entered around a table into a solemn compact, orally or in
3 writing, telling and stating that they had formed a con-
4 spiracy, setting forth the details of the plan, the means
5 by which the unlawful objects would be attained and the
6 part to be played by each member. It would be most extra-
7 ordinary if there were ever any such agreement. Your
8 conscience well tell you that when men and women in fact
9 undertake to enter into a criminal conspiracy, much is
10 left to unexpressed understanding. From its very nature,
11 a conspiracy is invariably secret in its origin and sec-
12 ret in its execution.

13 It is sufficient if two or more persons in any
14 manner, through any contrivance, impliedly or tacitly
15 come to an understanding in common to violate the law.
16 Express language or specific words are not required to
17 indicate assent or attachment to a conspiracy.

18 In determining, members of the jury, whether
19 there has been an unlawful agreement, you may judge acts
20 and conduct of the alleged members of the conspiracy
21 which are done to carry out an apparent criminal purpose.

22 Usually, the only evidence available is that of
23 disconnected acts on the part of the alleged individual
24 conspirators, which acts, however, when taken together,
25 in connection with each other, show a conspiracy or

2 agreement to secure a particular result as satisfactorily
3 and as conclusively as more direct proof.

4 If, for example . . . , several persons got to-
5 gether and shortly thereafter there is concerted action
6 among them with each of them doing something to relate it
7 to the activities of the others, all of which contributed
8 in a similar manner ~~toward the accomplishment of the same~~
9 unlawful objective, such evidence would support the infer-
10 ence that those persons had conspired to accomplish that
11 purpose.

12 You must first determine, from all the evidence,
13 whether or not a conspiracy as charged did in fact exist.

14 You are not to judge the character and effect of a con-
15 spiracy by dismembering it and viewing it in its separate
16 parts, but only by looking at it as a whole. It is suf-
17 ficient if from proof ~~of~~ all the relevant facts you
18 find beyond a reasonable doubt that the minds of at least
19 two alleged co-conspirators met in an understanding way
20 to bring about a deliberate agreement to do the acts as
21 charged in this indictment.

22 If you do conclude that a conspiracy as charged
23 did exist, you must next determine whether this defendant
24 here on trial, Wilson Torres, was a member of the conspi-
25 racy, that is, whether he knowingly and willfully associated

2 himself with the conspiracy.

3 In making this determination, you should examine
4 and consider all the evidence. I should say, of course,
5 that knowingly means to do an act voluntarily and inten-
6 tionally and not because of mistake or negligence or inad-
7 vertence or some other such innocent reason. Willfully
8 means to act deliberately and with a bad motive, but it
9 is not necessary that a defendant know that he is violating
10 a particular law.

11 Now, mere association of one defendant with an-
12 other, of one defendant with an alleged conspirator, or
13 even knowledge of the conspiracy, standing alone doesn't
14 establish participation in the conspiracy, if you find
15 that in fact a conspiracy existed.

16 In determining whether a defendant was a member
17 of a conspiracy, you are to consider whether in some sense
18 he promoted the venture himself, made himself a part of
19 the venture.

20 The actions and declarations of a person who is
21 found by you to have been a member of the conspiracy made
22 during its pendency and in furtherance of its **objectives**, are
23 considered the acts and declarations of every member of
24 the conspiracy.

25 If there was, in fact, a partnership in crime,

2 then any act, statement or declaration of one partner
3 in furtherance of the partner's purpose becomes the act
4 and declarations of every other partner though they may
5 not even have been present.

6 Ladies and gentlemen, we come to the expression
7 which you have heard several times, overt act, and which
8 on yesterday when we started I explained briefly. Now,
9 let me explain in a little more detail.

10 An overt act is an essential element of proof
11 of a conspiracy, as you heard. Now, what is an overt
12 act? It is any step, action or conduct which is taken
13 to achieve, and accomplish, or further the object of the
14 conspiracy. It is not necessary for the government to
15 prove all the overt acts alleged in the indictment or,
16 indeed, any one of them. Proof of any one overt act, as
17 I have just defined overt act, is sufficient.

18 An overt act is any step taken to further the
19 agreement, the **conspiracy**, and you may wonder why
20 Congress require proof of one overt act, and the reason
21 is this: Parties, as I may have explained yesterday,
22 might conspire and agree to do an unlawful act but they
23 might change their minds before they had taken any single
24 step to accomplish the unlawful purpose of their agreement,
25 and, if so, they would not have committed an offense.

2 There must be at least one step taken to further the object
3 of the conspiracy and, of course, it makes no difference
4 th the indictment alleges that an overt act took place
5 on a certain date, and you find from the evidence that it
6 took place on a different date. If you find that it
7 occurred on or about the date in the indictment, that
8 would be sufficient and, as I say, it would be sufficient
9 if none of the overt acts in the indictment were proved
10 if some other overt act was proven.

11 The government is not required to show that an
12 overt act is criminal in itself, because the overt act
13 may, but need not, be in itself criminal. It may mean
14 simply engaging in conversation or meeting on street cor-
15 ners, and ordinarily such conduct would be innocent, but
16 if engaging in a conversation or meeting on a street cor-
17 ner is for the purpose of accomplishing the object of a
18 conspiracy, then such conduct ceases to be innocent and
19 becomes an overt act in furtherance of a conspiracy.

20 Now, another principle to observe, ladies and
21 gentlemen of the jury, is that the guilt of a conspirator
22 is not governed by the extent or duration of his participi-
23 pation in the conspiracy or whether he had knowledge of
24 all of its operations. Some conspirators may play major
25 roles, other conspirators may play minor roles. Even if

2 a conspirator joins the conspiracy after it had been formed
3 and was engaged in it to a degree more limited than that
4 of other conspirators, he is equally culpable, equally
5 guilty, so long as he was a co-conspirator. In a word,
6 it is not required that a person be a member of the con-
7 spiracy from its very start. He may join it at any point
8 and be held responsible for all that had been done before
9 he joined and all that may be done thereafter so long as
10 he remains a member of the conspiracy.

11 Madam Foreman, ladies and gentlemen of the jury,
12 intent involves the person's state of mind and while this
13 is a fact, it is a fact which it is impossible to prove by
14 direct evidence short of an express admission by a defend-
15 ant. Like any other fact, intent may be proved by cir-
16 cumstantial evidence and proof of the circumstances sur-
17 rounding a transaction may supply an adequate and con-
18 vincing basis for finding the intent of the defendant.

19 I must say a few brief words about the credibility
20 of witnesses. In weighing and determining the credibility
21 of witnesses, you rely on your ordinary common sense as
22 practical men and women. You draw on your own past ex-
23 perience. The degree of credibility to be given a wit-
24 ness depends on your estimate based on demeanor here on
25 the witness stand, your observation, and the substance

2 of the testimony. Did the answers seem frank, open, candid,
3 full? How did the witness impress you? You take each
4 one and on the basis of your everyday experience you de-
5 termine whether or not you believe the witness and to
6 what extent you may believe him or her.

7 If you should find that any witness has testi-
8 fied falsely as to any material fact, you may reject the
9 entire testimony of that witness, or you may accept such
10 part of it as you believe and may find corroborated by other
11 evidence in the case.

12 You may consider, in determining the credibili-
13 ty of a witness, whether a witness has any interest in the
14 matter or any motive which might affect or color his tes-
15 timony.

16 If he or she has such an interest, you may con-
17 sider this in weighing the testimony. An interested or
18 motivated witness is not necessarily unworthy of belief;
19 it is only a factor to be considered by the jury in deter-
20 mining what weight to give the testimony.

21 The law, members of the jury, doesn't compel a
22 defendant in a criminal case to take the witness stand and
23 testify and no presumption of guilt may be raised and no
24 inference of any kind may be drawn from the failure of a
25

2 defendant to testify.

3 Now, the intentional flight of a defendant after
4 the commission of a crime and after he is accused of a
5 crime or while his case is pending is not itself sufficient
6 to prove guilt, but flight is a fact which, if proved, may
7 be considered by the jury in the light of all other evi-
8 dence in the case in determining guilt or innocence. Of
9 course, there is no charge here that the defendant jumped
10 bail. Evidence of flight was admitted for your considera-
11 tion as to whether it showed consciousness of guilt and,
12 if so, whether this is evidence of guilt of this defend-
13 ant.

14 Whether or not evidence of flight shows a con-
15 sciousness of guilt and the significance to be attached
16 to any such evidence are matters exclusively within the
17 province of the jury, and the jury should bear in mind
18 that the burden or duty in a criminal case is not on the
19 defendant to call any witness or to produce any evidence.

20 Now, Madam Foreman, members of the jury, we
21 come to the conclusion of my instructions. I say that
22 each of you is entitled to his or her opinion. You should,
23 however, exchange views amongst yourselves, each with your
24 fellow jurors. That is the very purpose of jury delibera-
25 tion, to discuss and consider the evidence, to listen to

2 the arguments of fellows jurors, to present your individual views, to consult with one another and to reach agreement solely and wholly on the evidence if you can do so without violence to your individual judgment.

3 Any verdict, members of the jury, must be unanimous. You are not to consider or in any way to speculate 4 about the punishment which the defendant may receive if he is found guilty.

5 Under your oath as jurors, you cannot allow a consideration of the punishment which a defendant may receive if he is found guilty to influence your verdict in any way or in any sense to enter into your deliberations.

6 The function of a jury is to determine the guilt 7 or innocence of a defendant on the basis of the evidence and these instructions. It is the Judge alone, the Court, 8 who has the duty of determining the sentence, if there 9 is a conviction.

10 The charges here, ladies and gentlemen, are 11 most serious. A just determination of the case is important 12 to the government, it is equally important to the defendant. Under your oath as jurors, you must decide the 13 case without fear or favor solely in accordance with the 14 evidence and the law.

15 If the government has failed to carry its burden,

2 your sworn duty is to bring in a verdict of not guilty.
3 If the government has carried its burden, you must not
4 flinch from your sworn duty, but you must bring in a ver-
5 dict of guilty. The guilt or innocence of the defendant
6 is for you and you alone to determine.

7 Your verdict will be returned orally by your
8 foreman in open court. If during your deliberations,
9 you wish to see an exhibit, Madam Foreman should send
10 out a note by the marshal and we will send in the exhi-
11 bit to you. If you should wish any testimony read, like-
12 wise send a request through the marshal and your request
13 will be considered and if granted, arrangements will be
14 made.

15 Now, we reach the point in the trial where we
16 must say goodbye to our alternate jurors, Mrs. Morvan and
17 Mrs. Behler. You ladies should realize your services are
18 just as valuable and just as important as if you were
19 members of the 12 who will deliberate. We have alternate
20 jurors because we can not afford the time and expense of
21 two trials, and if any emergency arises, sickness or any
22 other thing by which a member of the jury has to be ex-
23 cused, we must use an alternate, and it frequently hap-
24 pens, even in short trials, that we must use alternates.

25 Therefore, alternate jurors are our insurance

2 against the necessity of a retrial and in excusing you
3 ladies with our thanks, I want you to understand the
4 function of alternate jurors. Thank you very much. You
5 may retire and take your things from the jury room so that
6 it can be vacated when the jury retires.

7 Now, Madam Foreman, ladies and gentlemen of
8 the jury, would you wait in the jury box patiently in
9 silence for just a few minutes while I see counsel at the
10 side bar for any last-minute questions of law.

11 (At the side bar)

12 THE COURT: Mr. Cutner?

13 MR. CUTNER: I have no objection to the charge,
14 your Honor. I have one further thing your Honor might
15 consider: You told the jury they could hear the testimony
16 read. I take it that they could also hear the charge or
17 part of it again and they might be interested in that as
18 well.

19 THE COURT: I don't usually do that. Of course
20 I would probably honor that request.

21 Mr. Naftalis?

22 MR. NAFTALIS: My one exception, your Honor,
23 relates to the Court's charge on the subject of flight,
24 that the defendant Torres request was for the giving of
25 the instruction as contained in Section 11.18 --

2 THE COURT: That is what I based it on.

3 MR. NAFTALIS: You did insofar as two of the
4 three paragraphs are concerned, but there is a second para-
5 graph which was specially added after the instruction had
6 been criticized, because of its absence, in the case of
7 Austin against United States 414F. 2d, 1155 and the only
8 reason in that case that it was not reversed was because
9 there was no objection.

10 THE COURT: All right, I will add at least the
11 first sentence. I think the first sentence is enough.

12 Anything else?

13 MR. NAFTALIS: No, your Honor. I excepted to
14 the language about conspiracy before.

15 THE COURT: Yes.

16 (In open court)

17 THE COURT: Now, members of the jury, I return
18 to the question of evidence of flight, which you remember
19 I explained might be considered by the jury as evidence
20 of consciousness of guilt and, therefore, evidence of
21 guilt of the defendant. In your consideration of evidence
22 of flight, you should also consider that there might be
23 reasons for flight which are fully connected with innocence.
24 It may also be that a feeling of guilt may not necessarily
25 reflect actual guilt.

2 Now, Mrs. Nemiroff, Madam Foreman, I am going
3 to give you a copy of the indictment, as explained before.
4 Would you give that to the foreman, Madam Clerk?

5 THE CLERK: Yes, your Honor.

6 THE COURT: Madam Clerk, would you swear the
7 marshals?

8 (Marshals sworn)

9 THE COURT: Madam Foreman, ladies and gentle-
10 men of the jury, the case is submitted to you for your
11 decision. The marshals will accompany you to the jury
12 room. You may retire. Thank you.

13 (At 4:15 p.m. the jury retired to the jury room)

14 THE COURT: Gentlemen, we will await the
15 pleasure of the jury.

16 (Pause)

17 (Judge Wyatt not present)

18 MR. CUTNER: May the record reflect that the
19 following 3500 material was turned over to defense counsel
20 by the government at appropriate times during the trial
21 and, indeed, that much of this was shown to defense coun-
22 sel on two occasions last week, in advance of the trial.

23 MR. NAFTALIS: I agree I received the 3500
24 material in this case and indeed last week I was permitted
25 to see some of it relating to the witness Guzman and the